

Comments

Consumer Credit Reports and Privacy in the Employment Context: The Fair Credit Reporting Act and the Equal Employment for All Act

By RUTH DESMOND*

Introduction

EMLOYERS ROUTINELY USE consumer credit checks to evaluate job candidates. H.R. 3149 (the “Equal Employment for All” Act), introduced to Congress in July 2009, proposes to amend the Fair Credit Reporting Act (“FCRA”) to prohibit this practice. It provides an excellent starting point for addressing employee and job applicant privacy concerns. Without stricter oversight by the Federal Trade Commission (“FTC”) and stronger legal remedies, however, the bill as enacted would remain largely unenforceable and would allow employers to misuse credit reports.

The use of credit reports in pre-employment background checks has become a prevalent practice among employers in recent years.¹ John Ulzheimer, President of Consumer Education at Credit.com explains why: “The recession has made this a buyer’s market when it comes to hiring, which may be leading more companies to use credit

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1. Tom Ahearn, *Bad Credit a Catch-22 for Jobseekers During Employment Background Checks*, MY BACKGROUND CHECK.COM (Sept. 1, 2009, 11:13 AM) <http://www.mybackgroundcheck.com/blog/post/2009/09/Bad-Credit-A-e2809cCatch-22e2809d-For-Jobseekers-During-Employment-Background-Checks.aspx>.

reports as screening criteria.”² As a rough indication of how the reports are used, a 2007 private industry survey found that thirty-three percent of companies in the retail industry conduct credit checks as part of pre-employment screening, almost exclusively at the corporate level.³ Employee Screen IQ, an employee screening services corporation, includes a credit report in all mid-level and upper management level pre-screen packages.⁴

Employers are using background checks on current employees more frequently. “Recurring background checks on current employees are becoming more of a common practice,” reports employment industry trade magazine, Occupational Health and Safety.⁵ “Continuous employee screening can help employers stay abreast of a person’s personal activities that can play a role in the individual’s employment standing.”⁶

Consumer credit reports are generated by Credit Reporting Agencies (“CRAs”) and consist of three main sections. An initial header section contains basic identifying and biographical information, including a person’s address, date of birth, social security number, spouse’s name, and job history.⁷ A second section contains a detailed credit history that credit-granting financial institutions gather and report to the CRAs. Credit histories vary widely depending on a person’s age, income, credit choices, payment history, financial and medical history, and circumstances. The credit history shows the amount and type of debt a person has, including mortgages, student loans, medical debt, and credit card debt.⁸ It also shows a person’s payment history by month for the past seven years, including both on time and late payments. Serious payment delinquencies, such as ac-

2. Pamela Yip, *Employers Increasingly Use Applicant’s Credit Histories In Determining Job Future*, DALLASNEWS.COM, Sept. 21, 2009, http://www.dallasnews.com/sharedcontent/dws/bus/stories/DN-perfi_21bus.ART.State.Edition1.3cf45d2.html.

3. PCG SOLUTIONS, PRE-EMPLOYMENT SCREENING PRACTICES IN THE RETAIL SECTOR I (2007), available at http://www.pcgolutions.com/Pre_employment_survey.pdf.

4. See Employee Screen IQ, Sample Packages, <http://employeescreen.com/packages.asp> (last visited May 10, 2010).

5. *Company Unveils List of 2009 Background Screening Trends*, OH&S: OCCUPATIONAL HEALTH AND SAFETY, July 7, 2008, http://ohsonline.com/articles/2008/07/company-unveils-list-of-2009-background-screening-trends.aspx?sc_lang=EN.

6. *Id.*

7. See, e.g., Electronic Information Privacy Center, The Fair Credit Reporting Act (FCRA) and the Privacy of Your Credit Report, <http://epic.org/privacy/fcra> (last visited May 10, 2010).

8. See, e.g., True Credit by TransUnion, Credit Report Guide, <http://content.truecredit.com/LearningCenter/reportguide/creditReportGuide.page> (last visited May 10, 2010).

counts transferred to collection agencies, are also recorded.⁹ A third section shows public records about the person, such as bankruptcies, liens, and legal filings including judgments and divorces.¹⁰

The FCRA, as administered and enforced by the FTC, regulates credit reports in the employment context. The FCRA was enacted in 1970 to stop widespread credit reporting abuses that included the falsification of consumer data to reach negative information quotas and the collection of sensitive personal information without consumers' knowledge.¹¹ Subsequent revisions increased consumer protections by requiring stricter data security standards and granting consumers one free credit report annually.¹² The FCRA allows employers to use credit reports broadly for evaluative purposes both in choosing employees and during employment.¹³ In return, employers must obtain employees' consent to request the credit report, and notify employees in the event of any adverse action taken on the basis of a credit report.¹⁴ CRAs, the entities that collect and disseminate consumer credit information, are required to maintain practices that reasonably ensure the accuracy and currency of the information they collect.¹⁵ Both private and agency enforcement measures exist in case of violation.¹⁶ H.R. 3149, if passed, will integrate with the existing provisions of the FCRA to eliminate the use of credit reports in many, if not most, employment contexts.

In theory, the FCRA provides sufficient protection to job seekers and employees. The passage of H.R. 3149 strengthens consumer privacy protections by barring employers' access to credit reports. In reality, however, the actual practices of both employers and CRAs significantly undermine the protections of the FCRA and the potential impact of H.R. 3149. First, job seekers and employees have little real choice about whether or not to allow employers to obtain credit reports. Second, the notice provision remains ineffective as long as employers make hiring decisions secretly and without uniform standards. Finally, and most importantly, weak statutory remedies and weak agency enforcement make it difficult to prove violations and pro-

9. *Id.*

10. *Id.*

11. Electronic Information Privacy Center, *supra* note 7.

12. *Id.* (discussing changes via the Consumer Credit Reporting Reform Act of 1996 and the Fair and Accurate Credit Transactions Act of 2003).

13. 15 U.S.C. § 1681a(h) (2006).

14. *Id.* §§ 1681b(b)(2)(A)(i), 1681b(b)(3)(a).

15. *Id.* § 1681e(b).

16. *Id.* §§ 1681(o), 1681(s).

mote compliance. These weaknesses allow employers to violate the FCRA as it exists today and would allow the violations to continue even if H.R. 3149 were passed.

I. Credit Reports in the Employment Context Under the FCRA

Legislators crafted the FCRA's employment rules to balance consumers' need for protection against privacy abuse with business's legitimate needs.¹⁷ The FCRA, therefore, includes employer-friendly provisions that allow for the review of job applicants' and employees' personal information.¹⁸ Under the current statutory scheme, employers gain substantial benefits, but job candidates and employees suffer needless privacy violations.

A. Benefits to Employers of Using Credit Reports as an Evaluation Tool

There are several important benefits to using credit reports in employee background checks. Credit reports can cheaply confirm information such as social security numbers and former employment, helping employers gage applicants' honesty by confirming information in resumes and job applications. In addition, because credit reports are such a rich source of personal and financial information, employers can assess potential candidates based on factors that may be important to them, but not easily ascertainable via resumes or interviews. Finally, to the extent that credit reports have become a standard element in the pre-screening process, they help employers avoid liability by using all available resources to prevent the hiring of dangerous or untrustworthy employees.¹⁹

But these benefits are far outweighed by the burden on consumers. Under the current statutory scheme, job candidates and employees suffer the burdens of nearly unrestricted employer access, disclosure of intimate and often misleading or inaccurate information, and the potential for discrimination.

17. Electronic Information Privacy Center, *supra* note 7.

18. See 15 U.S.C. § 1681b(a)(3)(B) (2006) (allowing CRAs to furnish credit reports for employment purposes); *id.* § 1681a(h) (defining "employment purposes" as "used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee").

19. See Privacy Rights Clearinghouse, Fact Sheet 16a: Employment Background Checks in California: New Focus on Accuracy, <http://www.privacyrights.org/fs/fs16a-califbck.htm> (last visited May 10, 2010).

B. A Broad Definition of “Employment Purposes” Allows for Unrestricted Access to Consumer Credit Reports

To obtain a credit report from a CRA, the requesting entity must have a permissible purpose.²⁰ Since the FCRA allows use of credit reports broadly “for employment purposes,”²¹ an employer can legitimately use the report for evaluating candidates for employment, promotion, reassignment, or retention,²² with the following exceptions: the credit report cannot be used in violation of equal employment opportunity laws,²³ and medical credit data cannot be provided unless it is relevant to job duties.²⁴ If the credit report contains medical information, then it is stripped of specific details so that employers cannot learn the nature of the medical problem or treatment.²⁵ This leaves employers free to use credit reports for any employee, at any time, to review any information that can be found in the report, as long as medical information is sufficiently depersonalized and as long as the use does not violate existing anti-discrimination laws. Since CRAs assemble and report financial information from multiple sources on an ongoing basis, such unrestricted access essentially allows employers to conduct a form of financial surveillance on their employees. Employees, however, have no corresponding means of controlling the information that employers receive. They cannot control the employer’s access to the information since it is allowed by the FCRA, and they cannot control the information itself because credit-granting institutions automatically report it.

C. Credit Reports Reveal Intimate Information, Raising Privacy Concerns

Credit reports reveal information that is intimate, yet incomplete, encouraging employers to draw potentially misleading conclusions about a person’s history and behavior. CRAs and employment screening services encourage employers to use credit checks as a general tool for character assessment and job suitability.²⁶ First, employers use a job candidate’s handling of credit as an indication of personal re-

20. 15 U.S.C. § 1681b(a) (2006).

21. *Id.* § 1681b(a)(3)(B).

22. *Id.* § 1681a(h).

23. *Id.* § 1681b(b)(1)(A)(ii).

24. *Id.* § 1681b(g)(1)(B).

25. *Id.* § 1681b(g)(1)(C).

26. See Nick Fishman, *Credit Reports: A Window to the Soul?*, SERVICE SPOTLIGHT (Aug. 25, 2008), http://university.employeescreen.com/credit_reports_background_checks.

sponsibility, under the theory that someone who is careful about debt management will be mindful of job responsibilities, and that someone with a checkered credit history or past bankruptcy will be irresponsible or possibly tempted to steal.²⁷ Further, employers look at a candidate's or an employee's total amount of revolving monthly expenses and overall level of indebtedness as an indicator of whether the applicant will be able to live on the salary the employer pays or can afford to offer.²⁸

However, credit reports can be misleading because although they offer a wealth of detailed information, they remain incomplete financial and personal histories. They merely offer an illusion of insight into a job candidate's or employee's morals, motives, or financial situation. This means that an employer looking at a credit report might be tempted to misinterpret the information that is there, because she will be unaware of the context or implications. As Daniel Solove writes, information databases capture "brute facts . . . without the reasons,"²⁹ which can lead to distortions in the overall picture of who a person is despite the technical accuracy of individual details.³⁰ When employers use credit reports, they may miss that a bankruptcy or negative credit history stems from illness or divorce rather than from financial mismanagement, for example. Additionally, a candidate or an employee may have a source of income not reflected on the credit report.

The situation is further complicated because employees may not have an effective way of countering the employer's conclusions. For example, a job candidate may never pass the first level of review among a large pool of applicants. Further, since employers are discouraged from asking personal financial questions in interviews,³¹ a job candidate may never get the chance to respond to the employer's assumptions about her finances. Taken to its extreme, this practice may lead employers to overlook or terminate a valuable, responsible employee who is experiencing financial upheaval simply due to a mechanical, thoughtless review of negative information in a credit report.

27. *Id.*

28. *Id.*

29. Daniel Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 *STAN. L. REV.* 1393, 1425 (2001).

30. *Id.*

31. See U.S. Equal Employment Opportunity Commission, Pre-Employment Inquiries and Credit Rating or Economic Status, http://www.eeoc.gov/laws/practices/inquiries_credit.cfm (last visited Apr. 1, 2010).

D. Inaccuracies Mar the Effectiveness of Credit Reports as an Evaluative Tool

No proof exists that credit reports constitute an effective evaluative tool. First, a meaningful connection between credit history and job performance has never been proven.³² Adam Klein, in testimony to the Equal Employment Opportunity Commission (“EEOC”), explained that the link between creditworthiness and on-the-job-theft is “simply not validated. There’s no evidence, no science to suggest that one’s credit has anything at all to do with propensity to steal.”³³ Second, credit reports contain too many inaccuracies to be reliable. A 2004 U.S. Public Interest Research Group study found that twenty-five percent of credit bureau reports contain errors serious enough that they could result in the denial of credit or employment.³⁴ And a prominent executive in the employment screening industry has said, “This is an industry that has delivered historically a very low quality product.”³⁵ Ultimately, then, employers gain a false sense of reassurance and control. The reassurance that they have eliminated the risk of hiring an irresponsible or even criminal employee is not borne out by the quality of the data that makes up the credit reports; and control over the hiring process in the form of a quantifiable assessment of personal responsibility is unsupported by scientific research.

E. The Use of Credit Reports Offers Employers Potential for Discrimination

Some information in credit reports may allow employers to discriminate on the basis of race, age, disability, or bankruptcy status, even though other areas of law grant a high level of protection to these classifications. For example, Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act of 1990 (“ADA”), and the Age Discrimination in Employment Act of 1967

32. Kelly Gallagher, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for “Employment Purposes” Goes Too Far*, 91 IOWA L. REV. 1593, 1600 (2006).

33. Adam T. Klein, Outten & Golden LLP, Testimony at the U.S. Equal Employment Opportunity Comm’n, Employment Testing and Screening Meeting (May 16, 2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/transcript.html> [hereinafter Klein Testimony].

34. ALISON CASSADY & EDMUND MIERZWINSKI, NAT’L ASSOC. OF STATE PIRGS, MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS 4 (2004).

35. Susan Gardner et al., *Does Your Background Checker Put You in Jeopardy?: A Case for Best Practices and Due Diligence*, 11 J. LEGAL, ETHICAL & REG. ISSUES 111, 117 (2008), (quoting Tal Moise, founder and former CEO of Verified Persons, a New York-based provider of advanced background screening).

(“ADEA”) prohibit the use of discriminatory employment tests and selection procedures.³⁶ The ADA prohibits employers from asking about potential employees’ disability status.³⁷ Finally, the Bankruptcy Code prohibits employers from discriminating against people who have declared bankruptcy.³⁸

1. Affinity and Co-Branded Credit Cards May Indicate the Holder’s Protected Status

Credit reports may be a back door through these strong legal protections. This is because consumer’s credit choices and financial history can reveal personal information identifying that consumer as a member of a protected class under equal opportunity employment laws. A person’s bankruptcy status, for example, is listed in the public records section of the credit report.

A second way this happens is through the use of affinity cards or cards affiliated with a cause or a charitable organization. Nearly half of all credit cards held by U.S. consumers are affinity or co-branded cards (that is, branded with a retailer’s name).³⁹ Most cards in this category are co-branded airline or major retailer cards that do not reveal anything about the holder’s race, age, gender, sexual orientation, or disability—yet, a significant minority do.⁴⁰ The names of the following affinity cards, for example, would clearly allow an employer to draw the conclusion (whether correct or not) that the holder was a member of a protected class: Latina Style, Red Hat Society, Human Rights Campaign, I’m Too Young For this Cancer Foundation.⁴¹ The name of the card appears on the consumer credit report. Although it may be abbreviated, the employer who has purchased the report can

36. See U.S. Equal Employment Opportunity Comm’n, *Employment Tests and Selection Procedures*, http://www.eeoc.gov/policy/docs/factemployment_procedures.html (last visited May 10, 2010) [hereinafter EEOC Fact Sheet].

37. 42 U.S.C. § 12112(d)(2) (2006).

38. 11 U.S.C. § 525(b) (2006).

39. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: BANKING, FINANCE, AND INSURANCE* at 734 tbl.1157 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/banking.pdf>.

40. For a comprehensive list of current credit cards on offer, see IndexCreditCards.com, *Complete Credit Card List*, <http://www.indexcreditcards.com/creditcardlist.html> (last visited May 10, 2010).

41. See *id.* For example, the Red Hat Society is a “network of women approaching 50 or beyond.” RedHatSociety.com, *About Us: What Do We Do?*, <http://www.redhatsociety.com/aboutus/whatwedo.html> (last visited May 10, 2010). The Human Rights Campaign is a civil rights organization that supports the lesbian, gay, bisexual, and transgender communities. HRC.org, *Who We Are*, http://www.hrc.org/about_us/who_we_are.asp (last visited May 10, 2010).

contact the CRA for details about anything on the report. Critics may argue the risk of sensitive information being revealed by an affinity card is low, given the relatively small total number of affinity cardholders, and the even lower percentage of cards with revealing names. But, it is impossible to tell before a credit report is pulled whether sensitive information will be revealed in this way. For this reason, every credit report has the potential to reveal sensitive information that could be used to make hiring decisions that violate equal opportunity employment laws.

Aside from revealing information related to classes protected under equal opportunity employment laws, affinity and co-branded cards may simply reveal personal preferences or attitudes that a job applicant or employee would rather not share, either because they reflect an unprofessional attitude (the Hooters card, for example), or because they reflect a viewpoint that is politically or culturally at odds with a potential employer's (Credo, for example, is known for its politically liberal attitude). While disclosure of this type of information to employers does not risk violation of the law, it nevertheless represents an opportunity for employers to evaluate candidates or employees based on factors unrelated to job duties. The result is a needless violation of privacy.

2. Credit Reports May Have a Discriminatory Impact When Used as an Evaluative Tool

Title VII of the Civil Rights Act requires tailoring employment assessments to the job position when there is a disparity in measured performance on tests or assessments.⁴² Credit reporting is included in the category of a test or assessment.⁴³ Credit reports raise concerns in the employment context because, measured as a group, racial minorities have lower credit scores compared to whites.⁴⁴ The causes of this disparity are not fully documented, but credit scores rely on several factors that disproportionately disadvantage racial minorities, such as type of employment, loan quality, and bankruptcy status.⁴⁵ This disparity becomes more troubling given the lack of a proven link between credit history and job performance.⁴⁶ While consumer credit

42. 42 U.S.C. § 2000-e (2)(a)(2) (2006) (prohibiting classifications based on protected status generally); *id.* § 2000-e(2)(k)(1)(A) (describing the standard of proof for practices which create a disparate impact).

43. EEOC Fact Sheet, *supra* note 36.

44. Klein Testimony, *supra* note 33.

45. *Id.*

46. *Id.*; *see also supra* Part I.D.

reports transmitted to employers do not include credit scores, many employment screening industry experts recommend avoiding consumer credit reports to keep from running afoul of Title VII unless the applicants' handling of credit directly relates to the position.⁴⁷ Equifax, one of the three national CRAs, recently announced it had stopped supplying credit reports for employment purposes.⁴⁸ And, the EEOC, in response to testimony gathered at a town hall meeting in May 2007, issued a fact sheet recommending that credit scores not be used as a pre-employment evaluation tool unless they were "job-related and consistent with business necessity."⁴⁹

In sum, while it is convenient and cost-effective for employers to use credit reports, the unrestricted access the FCRA allows employers leaves job seekers vulnerable to invasions of privacy. First, employers may gain access to intimate information that is both potentially inaccurate and open to misinterpretation. Second, credit reports may allow employers to discriminate by revealing information that would otherwise be protected under current employment law.

II. The FCRA's Strong Facial Protections Are Ineffective in Practice

While the FCRA includes important consumer protections, in practice, these protections are ineffective in the employment context. Specifically, the FCRA fails to adequately protect job seekers' and employees' privacy in the critical areas of notice, consent, access, and enforcement. Its notice requirements fail to address the hidden nature of employment decisions. Additionally, consumer consent is rendered meaningless when job seekers worry that not consenting may cost them a job. Consumers also lose meaningful access when their credit reports are transferred to a new context—when an employer evaluates information about a job candidate's financial past, and the job candidate has no way to access or change the information the employer sees. Finally, the FCRA's remedy for willful violations depends on evidence that is difficult for consumers to obtain, and its penalty for negligent violations dis-incentivizes consumers from pursuing legal claims. These weaknesses leave job applicants and employees with-

47. Gardner et al., *supra* note 35, at 124–25.

48. John Ulzheimer, *Equifax No Longer Selling Credit Reports for Employment Screening*, CREDIT.COM, Sept. 22, 2009, http://www.creditbuildersalliance.org/files/equifax_not_sell_reports_to_employers.pdf.

49. EEOC Fact Sheet, *supra* note 36.

out an important means of control over their privacy, their careers, and their potential income.

A. FCRA's Protections for Job Applicants and Employees

The FCRA provides two important protections for job applicants and employees. First, to request a credit check, employers must disclose to applicants or employees that they are requesting the report and obtain written consent.⁵⁰ Second, employers must certify to the CRA that the report is being used for a permissible purpose and that the user will not use it in a way that violates equal employment opportunity laws.⁵¹ If an employer takes adverse action (that is, does not hire, does not promote, or terminates an applicant or employee) based on information found in a credit report, it must do the following: give pre-adverse action notice to the job candidate or employee,⁵² provide a copy of the credit report and notice of rights under FCRA, which in theory allows the applicant or an employee a chance to clarify or dispute the information,⁵³ and give notice to the candidate or employee again when the adverse action has occurred.⁵⁴

B. The FCRA's Consent Requirement Has Little Practical Value

Unfortunately, the FCRA's statutory protections do not translate well to the employment context. First, the written consent requirement leaves job applicants little meaningful choice in practice.⁵⁵ As Adam Klein notes:

There's a general employment form, may run pages, and at the bottom right above where you sign it, it says, "you are giving permission to Employer X to do a credit check," so there isn't really any choice. If you would like to seek employment, you have to sign the form.⁵⁶

If a job seeker routinely refused to consent to allow a potential employer to access her credit report, then she would drastically reduce her chances of finding a job. This is what Paul Schwartz has called an autonomy trap—a situation in which a consumer technically retains control over whether or not to surrender her information, but forces

50. 15 U.S.C. § 1681b(b)(2)(A) (2006).

51. *Id.* § 1681b(b)(1).

52. *Id.* § 1681b(b)(3)(A).

53. *Id.*

54. *Id.* § 1681m(a)(1).

55. Klein Testimony, *supra* note 33.

56. *Id.*

such as market pressures or everyday needs render that choice meaningless in practice.⁵⁷

Not consenting might cause problems for an employee in an existing work environment as well. Because the use of credit checks is allowed so broadly for any employment purpose except discrimination, employers are allowed to take a wide range of punitive actions against employees for refusing to consent. In *Kelchner v. Sycamore Manor Health Center*,⁵⁸ for example, the Third Circuit held that the FCRA did not bar an employer from terminating an employee for refusing to consent to a credit check in the wake of a workplace-wide investigation in response to a theft;⁵⁹ therefore, employees will likely feel coerced into consenting out of fear of retaliation, investigation, being overlooked for future opportunities, or termination.

Furthermore, a single consent remains valid for the entire term of an employee's tenure at an organization. Employers can obtain consent "at any time before the report is procured or caused to be procured."⁶⁰ The Third Circuit has held that this language allows for a blanket, one-time authorization allowing the company to pull a credit report in the future.⁶¹ It is therefore left to the employer's discretion whether or not to re-notify prior to subsequent checks. The longer an employee has been with an organization, the more this undermines her consent. She may not understand that her initial consent means an ongoing ability to check; therefore, she may not think to check whether an adverse action has been taken due to a credit check. While there is no clear evidence that employers use credit checks in promotion and retention decisions to any great degree, to the extent that they do, employees are both missing a key piece of information about how they are being evaluated and a key element of control over their privacy.

C. The Notice Requirement Is Ineffective in Practice

The requirement for employers to disclose adverse action taken on the basis of a credit report is equally ineffective in practice because the law does not compel employers to reveal whether adverse action

57. Marcy Peek, *Information Privacy and Corporate Power: Towards a Re-Imagination of Information Privacy Law*, 37 SETON HALL L. REV. 127, 164 (2006) ("We cannot live in the modern world and refrain from consenting to the ubiquitous, company-biased privacy policies and stances. As Paul Schwartz has noted, this is an 'autonomy trap.'").

58. *Kelchner v. Sycamore Manor Health Ctr.*, 135 F. App'x 499, 500 (3d Cir. 2005).

59. *Id.*

60. 15 U.S.C. § 1681b(b)(2)(A) (2006) (emphasis added).

61. *Kelchner*, 135 F. App'x at 500.

was taken based on information revealed in a credit report.⁶² The process of evaluating and choosing employees is a subjective, hidden process with no oversight; the notice requirement is in reality no more than a request that employers act in good faith. As Adam Klein states, “you have . . . a hidden problem, a very clear pattern of using credit score and credit history for employment suitability, almost no information [is] available to the applicant who was denied employment based on that, either in whole or in part”⁶³ Since rejection is such a common part of the process of looking for a job, job seekers likely will not suspect their credit reports are to blame. This means they will be unlikely to investigate possible violations. The lack of insight into the hiring process means the FTC will also have difficulty learning about and pursuing violations.

D. Consumers Lack Meaningful Access in the Employment Context

In addition, the FCRA contains no requirements to tailor consumer information to the employment context.⁶⁴ Credit reports, designed to evaluate creditworthiness, are simply transferred to employers who use them for a fundamentally different reason. CRAs have no incentive to modify the reports since it would merely create extra expense and opportunity for error. Additionally, consumers have no opportunity to alter the reports. This undermines the access and choice principles of privacy protection because consumers lose the power to control not just the content of the information, but also the flow of that information (who receives it) and the future uses of that information.⁶⁵ In the employment context, consumers are not one but three steps away from the initial disclosure of personal information to the credit grantor.⁶⁶ In step one, the consumer receives credit or a loan. In step two, the CRA receives and processes information about the transaction with the credit grantor. In step three, the employer receives the information from the CRA in the form of the

62. Klein Testimony, *supra* note 33.

63. *Id.*

64. 15 U.S.C. § 1681b (2006).

65. Solove, *supra* note 29, at 1426 (“[Privacy] involves the ability to avoid the collection and circulation of such powerful information in one’s life without having any say in the process, without knowing who has what information, what purposes or motives those entities have, or what will be done with that information in the future.”).

66. See, e.g., Experian, Product Sheet: Employment InsightSM, available at http://www.experian.com/products/pdf/employment_insight.pdf. This sample employer’s credit report shows which real estate and credit accounts the potential employee has opened.

credit report; however, the only chance consumers have to alter their financial habits comes at the initial stage of applying for credit. It is unlikely, though, that consumers will make decisions proactively about their credit with an eye toward the employment context. In fact, it may not be financially possible or desirable to do so.⁶⁷

Such a system brings to mind Daniel Solove's analogy to the seemingly capricious, impenetrable use of information by the centralized bureaucracy in Franz Kafka's *The Trial*—what he calls “control out of control” accurately captures many of the problems inherent in the transfer of consumer credit data in the employment context.⁶⁸ Like the main character in *The Trial*, job applicants' and employees' prior decisions about credit are subject to the scrutiny of a series of large organizations whose motives and impact are unclear, and whose effects manifest as arbitrary, irrational intrusions into their daily lives.

E. Remedies Lose Their Efficacy in the Employment Context

Finally, the FCRA's remedies are not designed for harm in the employment context. For any instance of willful violation, employers are liable for actual damages (or up to \$1000 if there are no actual damages), punitive damages, and attorney's fees.⁶⁹ Employers who violate equal opportunity employment laws, fail to inform employees that they will be subject to a credit check, or fail to give notice to an employee of an adverse action based on a credit check are subject to penalties.⁷⁰ At first glance, these penalties seem sufficiently steep to function as an effective deterrent; however, job candidates and employees will have difficulty finding evidence of violations.⁷¹ For example, if an employer fails to give a job candidate notice that her credit report will be used in the hiring decision, she will only learn of the violation if she fortuitously requests her own credit report after the employer has requested it.⁷² Additionally, since employers have no in-

67. See Solove, *supra* note 29, at 1426–27 (“The choices given to people over their information are hardly choices at all. People must relinquish personal data to gain employment, procure insurance, obtain a credit card, or otherwise participate like a normal citizen in today's economy. Consent is virtually meaningless in many contexts.”).

68. *Id.* at 1440.

69. 15 U.S.C. § 1681n(a) (2006).

70. *Id.* § 1681b.

71. Klein Testimony, *supra* note 33 (“Of course, most job applicants screened out of jobs for unlawful reasons never know why; an applicant rejected for having an insufficiently positive credit record typically will not know that a never-disclosed employer credit-history check is the reason. This is an example of why there are far fewer lawsuits alleging hiring discrimination than alleging firing discrimination . . .”).

72. *Id.*

centive to give job candidates or employees notice of adverse action in the event of a negative decision due to a credit report, consumers will need to seek out evidence based merely on the suspicion that a credit report may have been involved in the decision. As discussed above, given the hidden nature of hiring decisions, tangible evidence will be scarce.⁷³

Even if a consumer finds evidence of a violation, it will be difficult to prove a willful intent to violate the law. Neither large nor small companies are likely to have written policies that express an intention to discriminate or to fail to provide required notices. Large companies may have hierarchical organizational structures that allow upper management to plead ignorance about lower-level management decisions. Small companies may be genuinely ignorant about the law. Given these evidentiary concerns, consumers will have difficulty building a successful case.

For a negligent violation of the FCRA, the penalty to employers consists of actual damages and attorney's fees.⁷⁴ While the same evidentiary limitations apply to unearthing negligent violations, consumers will not have the burden of proving intent to violate the law.⁷⁵ However, since the penalty is limited to actual damages rather than allowing for a fine or punitive damages, consumers will have very little incentive to litigate even strong cases. This is because the negligent misuse of credit reports in the employment context rarely results in a significant amount of actual damages.⁷⁶ First, employers can argue that the mere failure to give notice when a report is used or is the basis for an adverse decision is not the cause of the harm. They will argue that the harm is the failure to hire, promote, or terminate, and can point to other factors that led to the decision.⁷⁷ Second, even if a job candidate can prove that a credit report caused her to lose a job offer, any argument that lost wages constitute valid actual damages could be seen as speculative. Even in a firing, it may be hard for an employee to gain his or her job back, because it will be hard to prove a

73. See *supra* Part II.C.

74. 15 U.S.C. § 1681o(a) (2006). The FCRA carries criminal penalties as well; however, criminal violations are unlikely in the employment context and are, therefore, outside the scope of this discussion.

75. *Id.*

76. Hon. D. Duff McKee, J.D., *Liability for Wrongfully Furnishing or Obtaining a Credit Report Under the Federal Fair Credit Reporting Act*, 44 AM. JUR. PROOF OF FACTS 3d 287 (2009) (“[A]ctual damages recovered by private litigants have generally been meager. Typical are claims for a few hours or days of lost wages because of the time taken to handle the matter.”).

77. Klein Testimony, *supra* note 33.

credit report is the reason for not *rehiring*. For example, a Maryland woman was terminated when a background check erroneously categorized her as failing the security clearance required for her job.⁷⁸ The error was corrected, but her employer cited a company reorganization and poor performance in its decision not to rehire her.⁷⁹

CRAs that fail to obtain certification from employers or fail to maintain accurate, up-to-date information about consumers may also be liable for negligence, and are subject to penalties for actual damages and attorney's fees.⁸⁰ To prove negligence, a consumer must show that a CRA failed to maintain reasonable procedures to ensure accuracy or certification.⁸¹ However, in its commentary, the FTC sets minimal requirements for the "reasonable procedures" standard.⁸² A CRA cannot be found liable for reporting inaccurate information unless its procedures indicate systematic errors.⁸³ Incidental errors are not enough. Additionally, CRAs may rely on a source that it "reasonably believes to be reputable" and that is "credible on its face" without conducting further investigation.⁸⁴ While it makes sense to limit the amount of due diligence CRAs must perform for practical reasons, completely eliminating liability based on incidental errors seriously undermines consumers' ability to prove negligence, with the result that CRAs may lose incentive to maintain accurate records. The reasonable procedures standard also fails to take into account the fact that CRAs may themselves generate errors in credit reports that do not quite rise to the level of systemic concern, yet have profound effects on their subjects' lives.⁸⁵

Finally, the FCRA limits liability such that the only penalties applicable to CRAs and employers are those specified in sections 1681(n) and (o).⁸⁶ While the evidentiary difficulties discussed above⁸⁷ would

78. Scott Calvert, *Fired Due to Error in Background Check, Carroll Woman Still Jobless*, THE BALTIMORE SUN, Oct. 28, 2009, at Local 1A.

79. *Id.*

80. 15 U.S.C. § 1681n–o (2006). CRAs are also subject to penalties for willful and criminal violations of the FRCA, but since these are unlikely in the employment context, they are outside the scope of this discussion.

81. *Id.* §§ 1681e(a), 1681o.

82. 16 C.F.R. § 607(3) (2000).

83. *Id.* § 607(3)(A).

84. *Id.*

85. Gallagher, *supra* note 32, at 1598. When generating a new report, it is possible for CRAs to mix up the names and personal information of two separate people. This could result in disaster if one of those names or social security numbers is, for example, associated with a serious felony.

86. 15 U.S.C. § 1681h(e) (2006).

87. *See supra* Part II.C.

make it difficult for consumers to prove an invasion of privacy in most cases, eliminating the possibility altogether undermines the FCRA's fundamental goal of consumer protection, and sends a signal to potential violators that incidental infractions, and the subsequent effects on individuals' lives, are unimportant.

In sum, the FCRA fails to provide meaningful privacy protection to job seekers and employees in the critical areas of notice, consent, access, and enforcement. This failure allows employers and CRAs to invade consumers' privacy with impunity. This passivity risks sending the message that the government values corporate concerns more than civil rights.⁸⁸ Worse, such a gap between the government's stated goals and its actual ability to implement those goals may undermine citizens' trust in the power of pro-consumer legislation altogether.

III. The Privacy Implications of House Resolution 3149

H.R. 3149, introduced by co-sponsors Steve Cohen (D-TN) and Luis Gutierrez (D-IL and chairman of the Subcommittee on Financial Institutions and Consumer Credit) in July 2009, directly addresses the failings in the FCRA.⁸⁹ It attempts to protect job candidates and employees by restricting employer access to credit reports. If enacted, consumers will have better protection in terms of the privacy principles of notice, access, and choice. H.R. 3149 also provides stronger protections against discrimination. However, enforcement remains the same as under the FCRA, thus, undermining the new bill's goals.

H.R. 3149 seeks to limit the use of credit checks in the employment context to prevent employers from taking job seekers' negative credit histories into account in hiring decisions.⁹⁰ The sponsors were motivated by the concurrence of the rise of the use of credit checks in pre-employment screening and the rise in negative credit histories due to the economic crisis.⁹¹ They wished to prevent victims of economic circumstance from suffering increased difficulties in the job

88. Peek, *supra* note 57, at 160 ("The actual legal regime is one in which corporations possess virtually full license to engage in their chosen anti-privacy practices. Rather than complying with government's law, corporations view privacy violations as the norm and any (unlikely) penalty that may result as merely the cost of doing business.").

89. H.R. 3149, 111th Cong. (2009).

90. Stephen Broderick, Website of Congressman Steve Cohen: 9th Dist. Tenn., *Congressmen Cohen and Gutierrez File Bill to Remove Financial Barriers to Employment* (July 31, 2009), http://cohen.house.gov/index.php?option=com_content&task=view&id=914&Itemid=25.

91. *Id.*

market at the moment when they are most in need of regaining financial stability.⁹²

The legislation is currently under review with the House Committee on Financial Services⁹³ and has been endorsed by multiple consumer advocacy groups, including the National Consumer Law Center and the U.S. Public Interest Research Group; by civil rights advocates, including the NAACP and Asian American Justice Center; by employment law organizations, including the National Employment Lawyers Association;⁹⁴ and by fifty-one other members of Congress.⁹⁵

A. H.R. 3149 Would Increase Consumer Privacy Protections

H.R. 3149 would, if enacted, protect privacy by greatly reducing the number of employers who can ask for credit reports. If passed, it will be integrated into the FCRA and bar the use of credit reports where any information contained in the report is used in employment evaluations or in making adverse employment decisions.⁹⁶ Importantly, it prohibits the use of credit reports even if applicants or employees expressly consent.⁹⁷ This eliminates the possibility that job seekers will feel coerced into granting consent lest they render themselves ineligible for the position. Further, by eliminating the transfer of personal data into a new context, consumers retain the same level of control they had over the data when they consented to its original collection.⁹⁸ This helps not only individuals, but also society as a whole, to contain the distortion that can result when data is automatically aggregated, packaged, and re-segregated without regard to its original context or purpose.

In addition, H.R. 3149 addresses Title VII concerns by restricting use to contexts where credit-worthiness is directly job-related. The resolution contains an exceptions clause that allows employers to use credit reports as a screening tool in the following limited situations: employment that requires national security or FDIC clearance; employment with a state or local government agency that currently requires a credit report for employment purposes; or for certain

92. *Id.*

93. Govtrack.us, H.R. 3149: Equal Employment for All Act, <http://www.govtrack.us/congress/bill.xpd?bill=H111-3149> (last visited May 10, 2010).

94. Broderick, *supra* note 90.

95. Govtrack.us, *supra* note 93.

96. H.R. 3149(2)(b)(1), 111th Cong. (2009).

97. H.R. 3149(2)(b)(2).

98. *See supra* Part II.D.

positions at financial institutions.⁹⁹ By tracking Title VII's intent to limit the use of pre-employment practices that have a disparate impact, the statute sends a strong message that credit reports are subject to the same restrictions that govern equal opportunity employment law generally. If enacted, then, H.R. 3149 would both encourage employers to strictly monitor their pre-employment screening practices to avoid discriminatory practices, and help put discrimination based on financial status on the same footing as other types of discrimination such as race and age.

H.R. 3149 would also likely have a positive effect on compliance. First, large organizations with well-trained staff are likely to understand and comply with the law.¹⁰⁰ Large organizations have the resources to stay abreast of changes in the law, and it seems unlikely they would risk violation for a means of evaluation as unproven as credit reports are. Also, given the bill's explicit references to equal opportunity employment in its title and in its use of the disparate impact standard, large organizations might question which agency would enforce the bill's provisions. The bill is silent on this matter, but corporations might be less willing to risk investigation and prosecution by the robust, active EEOC as opposed to the less aggressive FTC.¹⁰¹

Second, consumers would be better able to prove violations because violations would occur at the point of a non-authorized request, rather than a later, hidden, illegal evaluative use of a legally obtained report. This means there would be clear evidence of a violation—the CRA would have a record that the non-authorized employer had requested the report. Employers would likely be less willing to risk a non-authorized use with such clear evidence of misuse available. For the same reason, CRAs might also take more care to ensure unauthorized employers were not receiving reports, since they could be held liable for negligence.¹⁰²

99. H.R. 3149(2)(b)(3).

100. According to a survey conducted by the Society for Human Resource Management, compliance was one of the most important functions of Human Resources departments, second only to benefits administration. See CCH INCORPORATED, HUMAN RESOURCES MANAGEMENT—HR PRACTICES GUIDE, RESEARCH FINDINGS AND BUSINESS IMPLICATIONS—SHRM/CCH SURVEY (2009), available at 2009 WL 3202503.

101. One scholar notes, “[r]eliance on the FTC as a primary enforcer of citizen privacy is misplaced. The prevention of privacy wrongs, and particularly the public wrongs, as such, is simply not part of the core mission of the FTC. . . . In fact, the FTC only grudgingly accepted involvement with privacy issues.” Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877, 888 (2003).

102. See *supra* Part II.C.

Finally, the FTC has become more active in enforcing abuses of the law in the employment context as evidenced by two recent cases that dealt with large employers who denied applicants employment based on information found in background checks without giving the applicants the required adverse action notices.¹⁰³ Both companies were found in violation of the FCRA, and the settlements included not only money damages, but also compliance requirements to preserve records and allow the FTC to monitor these records.¹⁰⁴ The FTC also imposed a judgment recently on TALX, the employment-testing subsidiary of Experian, which included record-keeping and reporting provisions. While the FTC's increased activity in enforcing employment-based uses of credit reports is not directly connected with HR1349, the new law's prohibition of credit checks in the employment context, if passed, would reinforce the FTC's oversight efforts by creating a backdrop of stronger consumer protection and making it clearer when the law was being violated.

B. Overbroad Exceptions Undermine H.R. 3149's Intent

While H.R. 3149 provides substantially more privacy protections to job seekers and employees by simply eliminating the use of credit reports in the majority of employment situations, its exceptions may be read to allow more employers to use credit reports than necessary. First, all state and local government agencies which currently require credit reports would be able to continue to require them under H.R. 3149.¹⁰⁵ The new bill makes no attempt to require these government agencies to justify their ongoing use.¹⁰⁶ There are obvious politically practical reasons for this—limiting government use might hamper the bill's passage since it is dependent on the votes of Congress members who want to protect their home states. One might also make a legitimate argument that, like positions which require security clearance, state and local government positions provide enough access to sensitive information to warrant extra security measures in the form of credit checks. Such a large blanket exception, however, ultimately seems unjustified in a bill whose goal is equality.

103. See *United States v. Quality Terminal Servs., L.L.C.*, No. 09-CV-01853-CMA-BNB, 2009 WL 2877434 (D. Colo. Aug. 10, 2009); Complaint, *United States v. Rail Terminal Servs., L.L.C.*, No. 082 3023 (W.D. Wash. Aug. 5, 2009), available at <http://www.ftc.gov/os/caselist/0823023/index.shtm>.

104. See, e.g., *Quality Terminal Servs.*, 2009 WL 2877434, at *3–4.

105. H.R. 3149(2)(b)(3)(B), 111th Cong. (2009).

106. *Id.*

Second, a badly crafted definition of employees who fall under the financial services category will allow for an overly broad interpretation of the exemption. H.R. 3149 allows for the use of credit reports “[w]hen the consumer applies for, or currently holds, a supervisory, managerial, professional, or executive position at a financial institution.”¹⁰⁷ It seems as if the intent of the bill is to restrict the use of credit reports to positions that will have some form of direct control over company finances. The bill, however, can be read to include a much broader range of positions. The use of “professional” is especially troubling in its vagueness. Merriam Webster’s Collegiate Dictionary definition includes variants from “engaged in one of the learned professions” to “engaged in by persons receiving a financial return.”¹⁰⁸ If left undefined, such a vague use of the word “professional” creates a loophole which could potentially allow the use of credit reports for practically all, if not all, positions at financial institutions.

C. Agency Oversight and Judicial Enforcement Remain Weak

Additionally, significant areas of weakness in oversight and enforcement remain because H.R. 3149 does not strengthen the FCRA enforcement scheme.¹⁰⁹ First, if H.R. 3149 is enacted and well-publicized, then consumers might more easily prove violations when employers conduct unauthorized credit checks, because they might be more likely to check their own credit reports periodically during a job search. However, the bill might have the opposite effect. Consumers might feel their credit reports are unreachable by employers, so they may not check to see whether or not the reports have been illegally accessed. Second, due to the hidden nature of employment decisions,¹¹⁰ consumers will continue to have difficulties proving both willful and negligent violations against employers who have legal access to credit reports, but fail to give notice in the case of adverse decisions. Further, CRAs still have every incentive to continue to sell consumer credit reports in the employment context. It is in their financial interest to do so, and the minimal reasonable practices standard discussed

107. *Id.* 3149(2)(b)(3)(C).

108. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 991 (11th ed., 2004).

109. *See supra* Part II.E.

110. *See supra* Part II.C.

above¹¹¹ nearly eliminates their liability. Finally, consumers are still barred from bringing privacy tort claims.¹¹²

H.R. 3149 also imposes no new reporting or auditing measures to encourage compliance.¹¹³ The FTC therefore loses an opportunity to gather information about the use and abuse of credit reports in the employment context and to pursue claims. Minimal transparency in employment decisions means consumers cannot easily report violations to agencies or bring claims on their own.

D. H.R. 3149 Should Be Amended to Include Low-Burden, High Privacy Protection Enforcement Measures

There are several ways H.R. 3149 could be strengthened to offer job applicants and employees more privacy protections. The following set of options has a low burden on government and industry, a high level of privacy protection, and would ensure that H.R. 3149 was clear, appropriately tailored, and enforceable.

First, the exceptions should be narrowed to clearly define which jobs will be exempt. This can be accomplished by clearly defining “professional,” “supervisory,” “managerial,” and “executive” in subsection (2)(b)(3). Drafters can look to the Fair Labor Standards Act, which sets out a detailed definition of “professional” based on salary, education level, and skill level, as a model.¹¹⁴ Additionally, the language of H.R. 3149 should directly track the language of Title VII so that even government and financial employers are explicitly required to show relation to job duties and legitimate business need to obtain credit reports.¹¹⁵ Tracking the language of Title VII would ensure that no employer would receive an unwarranted exemption.

Second, H.R. 3149 should require CRAs to tailor any credit reports that do go to employers to avoid revealing private information unnecessarily. Social security numbers should be suppressed, as well as any names of any joint account holders and names of creditors. Unnecessary public records such as divorce judgments could also be

111. *See supra* Part II.E.

112. *Id.* Since H.R. 3149 imposes no new remedies, 15 U.S.C. § 1681h(e) (2006) will continue to allow CRAs and other users of credit reports immunity from privacy tort liability.

113. *See generally* H.R. 3149, 111th Cong. (2009).

114. 29 C.F.R. § 541.3 (2000).

115. “[A] respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and . . . fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

suppressed. This will preserve useful information about credit behavior without revealing intimate details or membership in a suspect class. This kind of stripping and repurposing of information is routine in information gathering industries and would not put an undue strain on resources.¹¹⁶ Further, CRAs are already required to take these same measures when medical information is repurposed.¹¹⁷

Third, H.R. 3149 should require CRAs to notify job candidates and employees when a credit report for employment purposes has been requested, and provide a free copy of the report if the applicant or employee would like one. CRAs are already required both to furnish reports to consumers upon request and to identify employers who have requested the consumer's credit report;¹¹⁸ the proposed requirement would merely extend the practice to all job candidates and employees. If the notification requirement were extended, then applicants and employees who were concerned about their privacy could confirm the request was authorized and report suspected violations. Applicants could also monitor the accuracy of their reports and notify CRAs of mistakes. While this change would put the burden on consumers to know the law well enough to understand when a credit report can be requested and what information it is allowed to contain, it would be a very cost-effective way of monitoring compliance. It would also put more control in the hands of the most interested parties—consumers.

Finally, H.R. 3149 should explicitly grant state attorneys power to pursue violations on behalf of consumers. The Health Information Technology for Economic and Clinical Health (“HITECH”) Act, passed as part of the 2009 Stimulus Package, provides a model. HITECH supplements the Health Insurance Portability and Accountability Act with increased enforcement measures, including an explicit grant of prosecutorial power to state attorneys general.¹¹⁹ If H.R. 3149 included such a measure, then it could leverage the power of state legal organizations without increasing federal expenditures.

116. For a discussion of how the database industry collects, parses, and sells information, see Daniel Solove & Chris J. Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 362–64 (2006).

117. See *supra* Part II.B.

118. 15 U.S.C. § 1681g(a) (2006).

119. 42 U.S.C.A § 17931 (West 2009).

E. H.R. 3149 Could Be Amended to Include Higher-Burden, Highly Protective Enforcement Measures

In addition to the suggestions above, H.R. 3149 could be amended to require significantly more involvement on the part of the FTC and increase penalties in case of violations. Enacting these changes would impose a relatively high burden on the government, CRAs, and employers, but it would create a very high level of protection for job applicants and employees.

First, H.R. 3149 could mandate that the FTC issue stricter guidelines about what constitutes “reasonable procedures” on the part of CRA certification of employer permissible use. These guidelines could include stipulations such as requiring a copy of the job applicant or employee’s signed consent form as an element of the certification process, requiring the CRAs to institute record-keeping and reporting procedures, and mandating external audits. In its judgment against TALX, for example, the FTC required TALX to retain records of all of its users and furnishers of credit information and training procedures, and subject these records to FTC audits.¹²⁰ This would ensure compliance on the part of the CRAs, since their procedures would be subject to thorough oversight. It would also ensure compliance on the part of employers, since third parties would be retaining proof of the fact that employers had requested credit reports and the FTC would be auditing these records to make sure they were not being requested in violation of the law.

Second, H.R. 3149 could mandate that the FTC conduct studies of the efficacy of the bill and the use of credit reports in the employment context. Title VII provides a model—it allowed the EEOC to conduct necessary studies¹²¹ and mandated a yearly report to Congress and the President, giving the EEOC an opportunity to make legislative recommendations.¹²² Such a provision would further empower the FTC to investigate employer and CRA activities and provide the groundwork for effective legislation and public education efforts in the future.

Third, H.R. 3149’s drafters should revise the bill to mandate that the FTC aggressively pursue violations. Since individuals have so little insight into the employment decision-making process, the FTC cur-

120. News Release, Federal Trade Commission, Consumer Reporting Agency TALX Corp. Agrees to Settle FTC Charges (July 9, 2009), <http://www.ftc.gov/opa/2009/07/talx.shtm>.

121. 42 U.S.C. § 2000-e(4)(g)(5) (2006).

122. *Id.* § 2000-e(4)(e).

rently has the only truly effective authority to review employer practices. Specifically, leveraging this authority constitutes the only way to successfully enforce failures to give consumers notice in the event of adverse actions. Also, since H.R. 3149, if enacted, will allow certain employers to have access to credit reports but bar others, the law will likely require interpretation. The FTC is in a better position than individuals to evaluate whether or not an employer's request for a credit report was authorized or not.

Finally, H.R. 3149, like HITECH, should add a third tier to its penalty structure. The first tier in the HITECH penalty structure amounts to a potential penalty of \$100.00 per error in gathered or transmitted data.¹²³ The penalty applies equally to covered entities (organizations that directly gather medical information) and business associates (entities that have a contractual relationship to use the data for their own purposes).¹²⁴ Penalizing users equally—no matter what their relationship to the data—maps well to the employment context, where both CRAs and employers share responsibility in the use of consumer credit data. Both types of organizations would have increased incentives to ensure accuracy and authorized use. Additionally, imposing minimal per se penalties for inaccuracies without regard to fault would send a strong message that the government cares about the integrity of financial data and the effect inaccuracies can have on people's lives.

Conclusion

H.R. 3149, if passed as currently drafted, would help protect job applicants' and employees' privacy by prohibiting the use of credit reports by most employers. While it would lay the groundwork for a strong consumer protections by attempting to limit the use of credit reports to situations where they are directly related to job duties, without more careful tailoring and better enforcement measures it will allow employers to violate the law. Legislators should rewrite H.R. 3149 to address these weaknesses by including, at a minimum, changes which would have a low burden on government and a positive effect on privacy protections. These changes include clearly defining exemptions, requiring CRAs to tailor information to the employment context and notify consumers when an employer requests a credit report, and strengthening enforcement by authorizing

123. H.R. 1 § 13410(d)(2) (codified as amended at 42 U.S.C.A. § 17931 (West 2009)).

124. *Id.* § 13404(a).

state attorneys general to prosecute violations. Legislators should also consider including changes that would impose a higher burden on the federal government, but which would maximize consumer privacy protections. These changes include stricter FTC guidelines, FTC studies and recommendations, aggressive prosecution of violations, and increased penalties. Together, these low-burden and higher-burden changes would address the weaknesses inherent in the FCRA's current scheme and send a strong signal of privacy protection.